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No. 93-618

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVID J. SHIELDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an alleged violation of 18 U.S.C. 2517(5), which governs the disclosure of court-authorized electronic surveillance, requires dismissal of a superseding indictment returned after any violation was cured by an expanded disclosure order.

2. Whether the district court correctly admitted evidence of petitioner's co-defendant's prior bad acts under Rule 404(b) of the Federal Rules of Evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 999 F.2d 1090. The opinion of the district court denying petitioner's motion to dismiss the indictment and suppress evidence (Pet. App. A18-A79) is reported at 783 F. Supp. 1058. The opinion of the district court granting the government's motion to admit evidence under Fed. R. Evid. 404(b) (Pet. App. A80-A84) is unreported. Related opinions of the district court are reported at 767 F. Supp. 163, 783 F. Supp. 1052, 783 F. Supp. 1094, 783 F. Supp. 1106, and 793 F. Supp. 768.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1993. A petition for rehearing was denied on August 27, 1993. Pet. App. A85. The petition for a writ of certiorari was filed on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; three counts of attempting to commit extortion, also in violation of the Hobbs Act; one count of causing a person to travel in interstate commerce to facilitate bribery, in violation of the Travel Act, 18 U.S.C. 1952; and two counts of making false statements to agents of the Federal Bureau of Investigation, in violation of 18 U.S.C. 1001. He was sentenced to 37 months' imprisonment, to be followed by three years of supervised release, and fined $6,000. The court of appeals affirmed. Pet. App. A1-A17.

1. Petitioner was the Chief Judge of the Chancery Division of the Circuit Court of Cook County, Illinois. The Chancery Division is the division of the Circuit Court that is responsible for hearing civil cases in which the parties are seeking injunctions and other equitable relief. As Chief Judge, petitioner had general administrative power over the Chancery Division and its other judges, in addition to having responsibility for hearing and deciding cases that were assigned to him. Indictment 1; Pet. App. A1.

As part of an FBI investigation into corruption in the Illinois state court system, federal agents created the fictional lawsuit of *Nichols* v. *Wilson*, a dispute between two partners

in an investment business. Nichols claimed that Wilson had wrongfully appropriated $350,000 in partnership funds. The two parties and Wilson's lawyer were actually FBI agents, and Nichols was represented by Robert Cooley, a corrupt attorney acting as a government informant. On July 12, 1988, the case was filed in the Chancery Division and randomly assigned to petitioner. Gov't C.A. Br. 3-4.

The agents wanted to have the case reassigned to the docket of a different judge, who Cooley believed was corrupt. Cooley asked Pasquale DeLeo, his former law partner and petitioner's co-defendant, to help get the case reassigned. DeLeo told Cooley that it was unnecessary to have the case transferred to a different judge because petitioner would accept bribes to fix the case. DeLeo also agreed to act as a middleman. On three separate occasions in August and September of 1988, Cooley paid bribe money to DeLeo, who then passed it on to petitioner in exchange for favorable rulings for Cooley's fictional client. Gov't C.A. Br. 1-8; Pet. App. A2-A4.

2. On August 29, 1988, the government obtained a court order authorizing it to conduct electronic surveillance of petitioner's judicial chambers pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521. The order authorized the government to intercept communications relating to "offenses involving the interference with commerce by extortion and conspiracy to do so" in violation of the Hobbs Act, 18 U.S.C. 1951; the order did not specify either Travel Act or false statement offenses. Gov't C.A. Br. 13; Pet. App. A18, A72. On August 31 and September 2, 1988, the government intercepted incriminating conversations between petitioner and DeLeo. In the August 31 conversation, petitioner and DeLeo discussed that it was "nice to have an inside track" in *Nichols* v. *Wilson*. In the September 2 conversation, DeLeo told peti-

tioner to "stall it 'till next week and the case will be settled." Petitioner agreed to "stall" the case. See Gov't C.A. Br. 7-8; Pet. App. A6, A8.

Federal prosecutors disclosed those and other intercepted communications to a grand jury sitting in the Northern District of Illinois. On December 19, 1990, the grand jury returned a seven-count indictment charging petitioner with violating the Hobbs Act, the Travel Act, and the federal false statement statute.

Petitioner moved to dismiss the indictment. He claimed that in seeking an indictment on the Travel Act and false statement charges, which were not specified in the order authorizing the electronic surveillance, the government had violated 18 U.S.C. 2517(5), which provides that when the government intercepts "communications relating to offenses other than those specified in the order of authorization or approval," those communications may be disclosed to a grand jury only "when authorized or approved by a judge of competent jurisdiction." See Pet. App. A71.

In response to petitioner's motion, the prosecution moved to dismiss the indictment, and the court granted the motion. The prosecutors then obtained a judicial order pursuant to 18 U.S.C. 2517(5) authorizing disclosure of the intercepted communications in relation to the Travel Act and the false statement statute, and the prosecutors subsequently disclosed the communications to a different grand jury. That grand jury returned a superseding indictment that was identical to the first indictment, charging violations of the Hobbs Act, the Travel Act, and the false statement statute. See Pet. App. A74.

Petitioner claimed that the superseding indictment should be dismissed as well, but the district court rejected his claim. The court held that the expanded disclosure order and the superseding indictment cured any possible violation of Sec-

tion 2517(5) and removed any prejudice that petitioner might have suffered. The court explained (Pet. App. A75-A77):

> Whatever technical violation of the statute the government may have committed, [petitioner] has made no showing that the government has engaged in the type of subterfuge which § 2517(5) was intended to prevent. As set forth in the previous sections of this opinion, the original authorization to monitor [petitioner's] chambers was lawfully obtained upon the requisite showing of probable cause. There is absolutely no evidence before the Court that the government sought that order in bad faith as a subterfuge for broader surveillance than [was] actually authorized. * * *
>
> Moreover, assuming that the government did make improper testimonial use of conversations concerning offenses not specified in the original authorization order, the Court would note that such conversations necessarily would have overlapped to a great degree, if not completely, with conversations which were within the ambit of that order. * * *
>
> [A]ny violation of Title III which the government committed * * * was purely technical, and in no way effected an end run around Title III's protections or a threat to [petitioner's] rights.

3 Prior to trial, the government moved in limine for an order permitting the government to introduce evidence of DeLeo's prior bribery of another former Cook County judge, Frank Salerno, arguing that the evidence of that bribery was admissible under Fed. R. Evid. 404(b). The district court denied the motion, but warned petitioner and DeLeo that they "might open the door to admission of the evidence in the event they argued defenses such as entrapment" or "rainmaking," *i.e.*, the argument that DeLeo had cheated

Cooley by taking the bribe money without passing it on to petitioner. Pet. App. A80-A81.

On September 6, 1991, DeLeo's counsel submitted proposed jury instructions that articulated a rainmaking defense. One instruction stated that "DeLeo argues, as one of his theories of defense, that the evidence presented shows that DeLeo scammed monies from Robert Cooley in August and September, 1988. It is DeLeo's position that if you find from a review of all the evidence that this is what happened and that there was no bribery involving [petitioner], then you must acquit DeLeo." Pet. App. A81. Based on DeLeo's submission of this instruction, the government renewed its motion for admission of the Rule 404(b) evidence. The district court granted the motion, explaining (Pet. App. A82):

> [I]t is now clear that DeLeo intends to argue that he was simply conning Cooley when he accepted money and said that he would use it to bribe [petitioner]. In this context, Salerno's testimony is properly admissible. The proffered evidence bears directly upon a matter which DeLeo has now placed in issue—his intent—and this is one of the matters other than propensity to commit the alleged offense which Rule 404(b) expressly identifies.

The evidence was admitted with a limiting instruction stating that the evidence was relevant only to the issue of DeLeo's intent. *Id.* at A16, A84. The jury returned a verdict of guilty on all counts.

4. The court of appeals affirmed. The court held that petitioner's argument that the indictment should be dismissed for a violation of 18 U.S.C. 2517(5) "fails on several grounds" (Pet. App. A10-A11, citations omitted):

> First, the defendants raised this issue in the district court and the government corrected any problem by obtaining a judicial order approving the release of information

> about Travel Act and false statement charges. It then voided the first indictment and took the case before a second and uninfected grand jury * * *. Thus the [superseding] indictments under which [petitioner] and DeLeo were convicted were not tainted. Second, it would have been impossible for the government to obtain authorization to wiretap based on false statement allegations because [petitioner] was not suspected of this crime until after the wiretapping began; the false statements were made by [petitioner] to the FBI at the tail end of the case. Third, the Travel Act and false statement charges were based on the same set of facts as the Hobbs Act violation. Since the government was free to release this information to a grand jury anyway under the Hobbs Act authorization, it is difficult to see how the defendants were harmed when the same facts were presented in the context of different offenses. It is true that empaneling a second grand jury will not cure an indictment based on unauthorized wiretapping. In this case, however, the government's indiscretion was not unauthorized wiretapping * * * but the disclosure of what it learned. * * * In [*United States* v. *Arnold*, 773 F.2d 823 (7th Cir. 1985)], we held that belated approval would cure a defective original authorization if the original order was lawfully obtained, sought in good faith, and the questionable communication was incidentally intercepted during the course of a lawfully executed order. Each condition was met in this case.

The court also rejected petitioner's argument that evidence of DeLeo's prior bribery of Judge Salerno should have been excluded. The court disagreed with petitioner that DeLeo's intent was irrelevant to the case, finding (Pet. App. A15) that DeLeo's "rainmaking defense * * * implicates intent because the defendant attempts to attach an innocent explana-

tion to otherwise inculpatory behavior." Indeed, the court stated that "DeLeo's intent either to bribe [petitioner] or merely con Cooley was the central question of the case." *Ibid.*

The court also disagreed with petitioner's claim that he was unfairly prejudiced by the admission of evidence of DeLeo's prior bribery of other judges (Pet. App. A15-A16): "Rule 404(b) is designed to prevent the admission of propensity evidence. Here, the Salerno bribes reflected on the characters of Salerno and DeLeo, but they conveyed nothing at all about [petitioner]." Thus, the court found, the evidence did not unfairly prejudice petitioner. In any event, the court noted that "the judge told jurors repeatedly and gave jurors an instruction to the effect that Salerno's testimony was relevant only to the issue of DeLeo's intent; that was sufficient." *Id.* at A16.

ARGUMENT

1. The court of appeals correctly rejected petitioner's claim that the superseding indictment should have been dismissed for a violation of 18 U.S.C. 2517(5). As petitioner concedes (Pet. 8), its ruling does not conflict with any decision of this Court or another court of appeals. Review by this Court is therefore not warranted.

a. The interception and disclosure of wire, oral, and electronic communications is regulated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. 2510-2521. Section 2511 generally prohibits the interception and disclosure of such communications, and Section 2515 specifically prohibits the disclosure of such communications in judicial proceedings, including grand jury proceedings.

Title III does permit interception and disclosure of wire or oral communications under certain circumstances. Section

2516 provides that a federal or state judge of competent jurisdiction may authorize interception of such communications, upon an application authorized by any of certain state and federal officials, if the interception may provide evidence of certain designated offenses, including violations of the Hobbs Act. Section 2517(5) in turn permits disclosure of lawfully intercepted communications relating to "offenses other than those specified in the order of authorization or approval," so long as a judge of competent jurisdiction finds that "the contents were otherwise intercepted in accordance with the provisions of this chapter."

b. Petitioner does not contend that the government illegally intercepted any communications in this case, or that it acted in bad faith in disclosing any of the intercepted communications. Indeed, he concedes that all the disclosed communications were relevant to the Hobbs Act violation specified in the initial order authorizing the surveillance, and therefore were properly disclosed to both grand juries in relation to that offense. Rather, petitioner claims that, because the original indictment charged offenses not specified in the initial surveillance order, the superseding indictment that was returned after the expanded disclosure order must be dismissed. That claim is without merit.

Under Section 2517(3), the government was authorized to disclose all of the intercepted communications in this case to the first grand jury. As both courts below recognized (Pet. App. A11, A75), the intercepted communications that established petitioner's violations of the Travel Act and false statement statute also established his violations of the Hobbs Act. Because the initial order authorizing the surveillance specified violations of the Hobbs Act, and because all intercepted communications related to those violations, the government was permitted to disclose all of the communications. Thus, even without the expanded disclosure order, there was no

violation of Title III. As the court of appeals explained (Pet. App. A11), "[s]ince the government was free to release this information to a grand jury anyway under the Hobbs Act authorization, it is difficult to see how the defendants were harmed when the same facts were presented in the context of different offenses."[1]

Moreover, any possible violation was cured when the government obtained the expanded disclosure order and then disclosed the communications to the second grand jury. As the court of appeals stated, "belated approval * * * cure[s] a defective original authorization if the original order was lawfully obtained, sought in good faith, and the questionable communication was incidentally intercepted during the course of a lawfully executed order." Pet. App. A11.

Petitioner concedes (Pet. 8) that no court has adopted his view that where an initial indictment charges offenses not specified in the initial surveillance authorization, a superseding indictment returned after an expanded disclosure order must be dismissed. To the contrary, both of the other courts of appeals that have considered the question have held that the return of a superseding indictment following judicial au-

[1] In *United States* v. *Brodson*, 528 F.2d 214, 215-217 (1975), the Seventh Circuit held that absent an expanded disclosure order, communications properly intercepted pursuant to an order specifying violations of 18 U.S.C. 1955 could not be disclosed to a grand jury in relation to charges under 18 U.S.C. 1084, when charges under the former statute were not sought. Similarly, in *United States* v. *Marion*, 535 F.2d 697, 703-707 (1976), the Second Circuit, following *Brodson*, held that communications properly intercepted pursuant to an order specifying state law violations could not be disclosed to a federal grand jury in relation to federal Hobbs Act and conspiracy charges. As the court below recognized in its discussion of *Brodson*, those cases are distinguishable because they "involved an indictment on different grounds entirely than the original authorization rather than, as here, additional grounds." Pet. App. A11.

thorization cures any defect. See *United States* v. *Vento*, 533 F.2d 838, 855-856 (3d Cir. 1976); *United States* v. *Kerr*, 711 F.2d 149, 151-152 (10th Cir. 1983).

Contrary to petitioner's suggestion (Pet. 6), this construction of the statute does not create an "exception * * * that swallows the rule" of Section 2517(5). That Section "is designed to prevent subterfuge searches." *United States* v. *Arnold*, 773 F.2d 823, 829 (7th Cir. 1985); see *United States* v. *Southard*, 700 F.2d 1, 31 (1st Cir.), cert. denied, 464 U.S. 823 (1983). Where the three-part test articulated by the court of appeals (Pet. App. A11) is satisfied—*i.e.*, where the interception order was lawfully obtained, where the order was sought in good faith, and where the questionable communication was incidentally intercepted during the course of a lawfully executed order—there is no danger of a subterfuge search. See *In re Grand Jury Subpoena Served on Doe*, 889 F.2d 384, 387-388 (2d Cir. 1989), cert. denied, 494 U.S. 1079 (1990).[2]

2. Petitioner also claims that the district court misapplied Fed. R. Evid. 404(b) when it admitted evidence of DeLeo's prior bribery of Judge Salerno. Rule 404(b) prohibits the use of similar act evidence "to prove the character of a person in order to show action in conformity therewith." The rule specifically provides, however, that such evidence may be admissible "for other purposes, such as proof of * * * intent." See *Huddleston* v. *United States*, 485 U.S. 681, 686 (1988). And as the court of appeals noted, DeLeo's intent was "the central question of the case." Pet. App. A15.

[2] In any event, petitioner does not claim that the government engaged in a subterfuge search in this case. Rather, as noted above, he concedes that the government properly intercepted all the communications in this case pursuant to the initial authorization order that specified violations of the Hobbs Act.

Contrary to petitioner's contention (Pet. 10), neither the district court nor the court of appeals sanctioned the admission of evidence of DeLeo's prior bribery to prove his character, and both expressly noted that evidence is not admissible under the Rule to prove the defendant's propensity to commit the crime charged. Pet. App. A14-A15, A82. Rather, the courts below allowed the admission of the evidence solely to prove that DeLeo's intention was to bribe petitioner. As the court of appeals explained, "both defendants asked the jury to believe that DeLeo's actions toward [petitioner]—handing the judge an envelope, talking to the judge behind closed doors, etc.—were innocent." *Id.* at A15. The evidence showing that DeLeo had bribed Judge Salerno helped to rebut that defense and supported the government's argument that DeLeo intended to bribe petitioner, just as evidence showing that DeLeo had deceived someone into believing that he had bribed Judge Salerno would have supported the defendants' claim that DeLeo intended to deceive his former partner in this case. Moreover, as the court of appeals noted, the district court instructed the jury that it should consider the evidence "only [for] the issue of DeLeo's intent." See *id.* at A16. With that limiting instruction, the evidence was properly admitted.

In any event, the admission of the evidence did not harm petitioner. As the court of appeals noted, "the Salerno bribes reflected on the characters of Salerno and DeLeo, but they conveyed nothing at all about [petitioner]." Pet. App. A15-A16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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